***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-7533

## United States Court of Appeals

FOR THE SECOND CIRCUIT

TRAVELERS INDEMNITY COMPANY,
*Plaintiff-Appellee,*

*—against—*

S.S. POLARLAND, HER ENGINES, BOILERS, ETC.,
*Defendant-Appellee,*

*—and—*

SEVEN SEAS SHIPPING CORP.,
*Defendant-Appellant.*

**BRIEF OF DEFENDANT-APPELLEE S.S. POLARLAND**


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## BRIEF OF DEFENDANT-APPELLEE S.S. POLARLAND

### STATEMENT

Nimpex International Inc. commenced an action to recover $35,000 damages for damage to a shipment of "cold rolled coils premier choix qualite commercial material non recuit non huile" by filing its complaint in the United States District Court for the Southern District of New York on September 6, 1973. The action was commenced against the S.S. POLARLAND, her engines, boilers, etc., (the defendant-appellee herein), D/S A/S Vestland, Rich. Amlie & Co. A/S, Seven Seas Shipping Corp. (defendant-appellant herein) and Ferrostahl, G.m.b.H. "(corporate characterization fictitious, defendant intended is explained in Schedule A)" (6a).*

*All references to the joint appendix are indicated with the letter "a."

Defendant-Appellant Seven Seas Shipping Corp. (hereinafter referred to as "Seven Seas") appeared and filed an answer on December 5, 1972 in which it admitted that it "is engaged in business as a carrier of merchandise by water and that [it] chartered the vessel known as S.S. POLARLAND on or about May 12, 1970" (14a), that "on or about May 12, 1970 the [S.S. POLARLAND] was a general ship employed in the common carriage of merchandise by water" and that "on or about May 12, 1970, at Cleveland, Ohio, the plaintiff delivered merchandise to be placed aboard the S.S. POLARLAND for shipment and agreed to pay freight charges for the transportation of said shipments to its port of destination" (15a).

On February 25, 1974 defendant Ferrostahl A/G filed a motion seeking an order vacating the service of the summons and dismissal of the complaint as to Ferrostahl A/G. The motion was granted by order dated March 25, 1974, which order was accompanied by a memorandum opinion in which the court noted that "[Ferrostahl A/G] specifically denies . . . that World Shipping was its agent" (73a).

On March 1, 1974 the S.S. POLARLAND, D/S A/S Vestland and Rich. Amlie & Co. A/S appeared and filed an answer in which D/S A/S Vestland admitted it owned the S.S. POLARLAND and Rich. Amlie & Co. A/S admitted it managed the S.S. POLARLAND (46a); said parties pleaded various statutory defenses, including the provisions of the United States Carriage of Goods by Sea Act (46 US 1300 *et seq.*) and a defense that the vessel "was operating under charter and, under the terms of the charter parties, [any damages] are due to causes for which [said defendants] are neither liable nor responsible" (48a). In addition the S.S. POLARLAND, D/S A/S Vestland and Rich. Amlie & Co. A/S made a cross claim against Seven Seas Shipping Corp. on three grounds: (1)

Seven Seas Shipping Corp. failed to "perform the obligations devolving upon [it] pursuant to the terms of the said charterparties," (2) Seven Seas Shipping Corp. "failed in the exercise of reasonable care and diligence," (3) Seven Seas Shipping Corp. "failed to fulfill the duties and obligations devolving upon it pursuant to the provisions of the United States Carriage of Goods by Sea Act" (50a), and said defendants demanded judgment against Seven Seas "for any and all sums which may be adjudged against defendants S.S. POLARLAND, D/S A/S Vestland and Rich. Amlie & Co. A/S in favor of the plaintiff by reason of the matters alleged in said complaint, together with the costs, disbursements and attorneys' fees incurred in the defense of this action" (51a). Seven Seas filed an answer to the cross-claim, essentially denying all allegations (53a, 54a).

Trial was commenced on June 18, 1974 before the Honorable Edward Weinfeld. On June 19, 1974 trial of the case was adjourned without date, dependent on the disposition of a motion to be made to add Travelers Indemnity Co. as a party plaintiff, which motion was granted on July 17, 1974 (298a, 76a).

On November 26, 1974 trial of the matter was recommenced. At the close of plaintiffs' case, Seven Seas moved to dismiss the complaint of Travelers Indemnity Company for a failure to make out a *prima facie* case because although the motion to add Travelers Indemnity as a party plaintiff had been granted, no testimony had been presented at trial to establish the rights of Travelers Indemnity Company to recover damages (trial transcript p. 260). Rather than dismiss, the court granted a further adjournment of the trial in order to permit plaintiff's counsel to take testimony overseas (trial transcript p. 266). However upon motion by counsel to the S.S. POLARLAND, the court

dismissed the cause of action of the original named plaintiff, Nimpex International Co., Inc. (trial transcript pp. 268-269).

Trial recommenced on March 1, 1976 on which day the court granted a motion to dismiss the complaint of Travelers Indemnity Company as to Rich. Amlie & Co. A/S (trial transcript pp. 309-310). Counsel to Seven Seas and to the S.S. POLARLAND stipulated, and the court agreed, that at the conclusion of the trial the court would rule as to entitlement to attorneys' fees but not as to the quantum of fees to be recovered if the claim for attorneys' fees was successful (trial transcript pp. 307-309). Trial was concluded on March 2, 1977.

In a memorandum decision dated August 17, 1976, the court found that D/S A/S Vestland was entitled to judgment dismissing the complaint (528a, 529a), that Seven Seas "as the carrier of the cargo, is held liable for the damage caused by the improper loading and stowage" and that the S.S. POLARLAND "also is liable for the cargo damage and a maritime lien may be enforced against it" (526a) but that the S.S. POLARLAND "is entitled to recover from [Seven Seas] the amount of the Maritime Lien against it as well as reasonable counsel fees incurred in the defense of the action" (527a).

Subsequent to the trial but before entry of judgment, counsel to Seven Seas and to the S.S. POLARLAND agreed that $10,000 represented reasonable counsel fees incurred by the S.S. POLARLAND in the defense of the action, and thus no hearing on the quantum of counsel fees was necessary. Accordingly, on September 17, 1976 the Honorable Edward Weinfeld ordered that Travelers Indemnity Company recover from the S.S. POLARLAND and Seven Seas Shipping Corp. $27,862.13, together with specified interest, and that the S.S. POLARLAND recover from Seven Seas Shipping Corp. any maritime lien as

enforced against the S.S. POLARLAND in the amount of the judgment and that the S.S. POLARLAND recover from Seven Seas the sum of $10,000 for reasonable counsel fees (531a, 532a).

On October 19, 1976 Seven Seas filed a notice of appeal from the judgment which had been entered September 20, 1976 (533a).

No issue is raised of the propriety of the court's dismissal of the complaint of Nimpex International Inc. or concerning the dismissal of the complaint of Travelers Indemnity Company as to D/S A/S Vestland and Rich. Amlie & Co. A/S, and, accordingly, the only issues to be resolved on appeal are those concerning Travelers Indemnity Company, as plaintiff-appellee, the S.S. POLARLAND (her engines, boilers, etc.) as defendant-cross-claimant-appellee and Seven Seas Shipping Corp. as defendant-appellant.

## FACTS

Under the terms of an agreement entered into on December 8, 1967, D/S A/S Vestland, as owner of the POLARLAND, bareboat chartered the POLARLAND to Molena Trust Incorporated, the period of this charter to run for approximately 96 consecutive calendar months (172a-186a).

Pursuant to the terms of a charterparty on the New York Produce Exchange form dated March 5, 1970, Molena Trust Incorporated, the bareboat chartered owner of the POLARLAND, chartered the POLARLAND for a minimum of 11 and a maximum of 13 months to Ferrostahl A/G (758a-764a).

Messrs. Ferrostahl A/G as disponent owners of vessels "to be nominated" entered into an agreement with Seven

Seas Shipping Corp., as charterers, dated March 5, 1970, on a Uniform General Charter form (GENCON) to provide vessels for carriage of shipments of steel products from, among other ports, Cleveland to, among other ports, Antwerp, the shipping dates and quantities to be mutually agreed. This charter also provided that "the cargo to be loaded, stowed, lashed and discharged by charterer's stevedores," and "for [any] vessel which has been nominated and accepted owners to give seven (7) days notice of load readiness to Seven Seas Shipping Corp. New York and also to keep charterers closely advised of vessel's position. Also to give agents at loading port 24 hours notice of ETA" (592a-595a).

Under the terms of the Ferrostahl/Seven Seas charterparty, Seven Seas, a corporation "engaged in business as a carrier of merchandise by water" "chartered the vessel known as S.S. POLARLAND" for the voyage which is the subject of plaintiff's action which commenced on or about May 12, 1970 at the port of Cleveland (Seven Seas' Answer to the Complaint, 14a).

"Seven Seas Shipping Corp. of New York (Carriers) and Nimpex International Inc. of New York (Shippers)" (597a) agreed upon certain terms and conditions governing the carriage of a shipment of steel coils from Cleveland to Antwerp, the terms of which, among others, provided that the cargo was to be discharged by the shippers/receivers stevedores; however, with regard to loading, pursuant to the instructions of the president of Seven Seas (469a) an adjustment was made in the wording of the printed form of agreement:

> Cargo to be loaded, ~~stowed, lashed and chocked by Shippers' stevedores at Shippers' risk, responsibility and expense~~ at the rate of. . . . (597a-598a).

In furtherance of its business as a carrier of cargo, Seven Seas had also entered into an agreement with Great Lakes International to the effect that "Great Lakes International will be [Seven Seas] exclusive stevedore in the port of Cleveland for the 1970 season" and that "payment will be made no later that 30 days after invoice date" (765a, 766a).

A shipment of 299 cold rolled steel coils was "loaded and stowed on board the M/S POLARLAND pursuant to the terms of [the contract entered into between Seven Seas Shipping Corporation and Great Lakes International Corporation]" (169a, 170a Request for Admissions, 206a, 207a Answer to Request for Admissions, 328a admissions read into the record); receipt of the shipment was acknowledged on bills of lading which were dated "New York, New York the 12th of May, 1970" issued by "World Shipping Inc. as agent only by authority of the master" over the written signature of "J. Reynolds" (724a-728a), assistant to the president of Seven Seas (497a).

Clause 7 of the charterparty between Ferrostahl and Seven Seas provided that "in every case the Charterers [Seven Seas] shall appoint his own broker or agent both at the port of loading and the port of discharge" (592a) and the agreement between Seven Seas and Nimpex, in the preface of which Seven Seas is designated as "Carriers" and Nimpex is designated as "Shippers" (597a) and pursuant to which the 299 coils were carried (469a-471a) provides that "vessel to be consigned to Carriers' agents at both ends" (601a). World Shipping Inc. was Seven Seas general agent in Cleveland (496a), and the Master of the POLARLAND authorized World Shipping to sign bills of lading for the cargo loaded on board the vessel (778a); Mr. J. Reynolds, who signed the bills of lading, was the assistant to the president of Seven Seas (497a).

In accordance with the payment term of the stevedoring contract with Seven Seas (766a), Great Lakes International Corp. forwarded to Seven Seas an invoice for the loading of the 299 cold rolled coils (754a).

The cargo of 299 cold rolled coils was discharged from the POLARLAND at the port of Antwerp in what plaintiff claims to be a condition other than that described in the terms of the bills of lading.

The surveyor who observed the claimed damage in Antwerp divided it into two categories: (1) ovalization and (2) mechanical damage (130a). Ovalization, according to the surveyor, "was caused during the process of lying down, laying down the merchandise" during loading which may have become aggravated during the sea voyage due to the unavoidable rolling of the vessel while the mechanical damage was due to handling either prior to or during loading (130a, 139a). The president of Seven Seas agreed that both types of damage complained of by plaintiff would have occurred during handling (490a). The POLARLAND was in no way involved with any handling of the cargo.

Seven Seas Shipping Corp. forwarded to Nimpex International Inc. an invoice for ocean freight for the carriage of the shipment from Cleveland to Antwerp ($30,044.90) together with charges of $1,960.40 for seaway tolls, with the invoice indicating that charges for stevedoring would be forwarded to Nimpex upon Seven Seas' receipt of the bills from the stevedores (782a).

## DISCUSSION OF "THE FACTS" SET FORTH IN THE BRIEF OF SEVEN SEAS

Several comments are in order concerning "the facts" set forth in the Seven Seas' brief.

The references to the joint appendix contained in the Seven Seas' "fact" section are worthy of close scrutiny since certain documents referred to were not admitted into evidence at the time of trial. Moreover, testimony and documents referred to often do not support the asserted "facts" and often a crucial point is stated to be a "fact" without any reference to the appendix or record whatsoever.

The first reference to the record on page 4 of Seven Seas' brief includes a reference to a survey report reproduced on page 772a of the appendix—this report was not admitted into evidence at trial.

With regard to the first footnote on page 4, although the statement may be accurate, there is no support for it in the record.

The studied attempt to ignore the fact that the "agreement" between Ferrostahl and Seven Seas was indeed a "charterparty" by constantly using the word "agreement" is incredible in view of the admission by Seven Seas in its answer to plaintiff's complaint that it had 'chartered" the POLARLAND as of May 12, 1970, the date the voyage from Cleveland commenced (14a). The president of Seven Seas admitted that he had agreed to the terms of the "Uniform General Charter" so that Seven Seas would have "some way of carrying Nimpex cargo . . ." (409a). Appellant seems to contend that the "Uniform General Charter" provided for the shipment of steel products "for the account of Nimpex" (p. 5, Appellant's brief). But for that same voyage of the POLARLAND Seven Seas invoiced Phillipp Bros. Inc. for carrying in excess of 10,000 long tons of steel from Cleveland to Antwerp (783a). Would appellant have the court believe that this was somehow also done for Nimpex's account or that Nimpex in some way benefited from this arrangement? Under subparts 7 and 8 of clause 16 of the charterparty between Ferrostahl and Seven Seas,

Seven Seas had the right to put any cargo it wished on board any nominated vessel it accepted (594a).

The first paragraph with regular margins on page 6 of Seven Seas' brief apparently seeks to discredit an agreement between Seven Seas and Nimpex, the shipper (592a-602a). This agreement was the subject of the following exchange between the trial judge and the president of Seven Seas, Davey Jones:

THE COURT:

> This is an agreement that is in evidence that was signed between Seven Seas Shipping Corporation and Nimpex.

THE WITNESS:

> Right, Sir (466a).

The same agreement was the subject of testimony of Seven Seas Shipping Cor . taken pursuant to notice before trial; the testimony was given again by the president of Seven Seas, who was questioned concerning his deposition testimony at trial:

> "Q. Was the shipment we are talking about today booked in connection with this booking note we marked Exhibit 12 [Trial Exhibit 13, 592a-602a]?
>
> "A. Yes sir."
>
> A. Yes that is right.
>
> Q. And that question referred to this shipment we have been discussing here, the 299 coils, is that correct?
>
> A. That is right.

Q. And that answer was accurate?

A. Right sir (471a).

This is the same document that appellant Seven Seas now refers to in its "fact" section as an "incomplete document *purporting* to be an agreement between Seven Seas and Nimpex;" Seven Seas' use of the word "purporting" is incredible in view of the above quoted sworn testimony of its president.

The paragraph discussed above from page 6 of appellant's brief also distorts the terms of the agreement between Seven Seas and Nimpex by stating that the agreement only obliged Nimpex to ship cargo when in fact the booking note is clear in regard to the obligation Seven Seas assumed:

> It is this day mutually agreed between SEVEN SEAS SHIPPING CORP. OF NEW YORK (Carriers) and Nimpex International Inc. of New York (Shippers) that the following terms and conditions will apply to the carriage of steel products which the Shippers agree to ship and the *Carriers agree to carry* . . . (emphasis added, 597a).

In the third paragraph on page 7 of its brief appellant cites pages 421a and 777a of the appendix as authority for the statement that World Shipping Inc. was "a general agent at the port of Cleveland;" but page 421a of the appendix only contains a reference to World Shipping as a "recognized steamship agent" in Cleveland while with regard to the document reproduced on page 777a, the court advised, at line 15 on page 421a, that the document was received in evidence with the specific proviso that its contents would not be considered "as proof of agency." In fact, the use of the word "general" is only found in the testimony of the president of Seven Seas that "World Shipping is our general agent in Erie, Cleveland, Toledo and other ports

near Cleveland" (496a), although he insisted that for the voyage in question Seven Seas appointed World Shipping as agent only for Ferrostahl (496a).*

At one point during his testimony the president of Seven Seas, in response to a question "with regard to the shipment of the POLARLAND, who was World Shipping representing, if you know?," initially responded "I don't know" but then, after pausing, went on with an explanation interpreting a clause "under the time charter, under the freight agreement" between Ferrostahl and Seven Seas, which portion of the answer was stricken by the court (422a).

With regard to Seven Seas' brief discussion of the opinion issued by Judge Weinfeld (appellant's brief pp. 8-10) several comments are called for.

On page 8 of its brief, somehow Seven Seas concludes that the court found that Seven Seas as the carrier of the shipment was not obligated to provide a seaworthy vessel and was not obligated to carefully carry and keep the shipment, an obligation of all carriers under the Carriage of Goods by Sea Act (46 USC § 1303)—apparently appellant came to this conclusion because these obligations were not mentioned in the opinion, but that is not to say that Seven Seas was not obligated as a carrier to comply with those, as well as all other provisions of the Carriage of Goods by Sea Act.

Appellant would have us believe that it had absolutely no control over the voyage or vessel, but this is contrary to the language of the charterparty it entered into with Ferrostahl; clause 17 of the charterparty (592a-596a) indicates that Seven Seas had the right to reject vessels

*In its memorandum opinion granting defendant Ferrostahl's motion to dismiss the complaint as to it on the grounds of a lack of jurisdiction, the court had held that "defendant [Ferrostahl] specifically denies . . . that World Shipping was its agent" (73a).

nominated by Ferrostahl, and this presumably for reasons of unseaworthiness, improper manning etc.

With regard to the comments in a footnote at the bottom of page 8 of Seven Seas' brief, it should be noted that cargo other than Nimpex cargo was certainly loaded on board the vessels — in fact Seven Seas billed Phillipp Bros. Inc. $132,717.05 for ocean freight and seaway tolls in connection with the carriage of over 10,000 tons of steel products from Cleveland to Antwerp on the voyage. This in fact bolsters the court's decision that Seven Seas was a carrier (783a). Appellant claims it "had no right to direct the passage of the POLARLAND" since the Ferrostahl/Seven Seas charterparty provides that the POLARLAND had the "liberty to call at any port or ports in any order, for any purpose" (593a); however subpart 6 of clause 16 of the charterparty between Ferrostahl and Seven Seas provides that Seven Seas will designate the discharge port. With regard to the liberty of the vessel to call at "any ports for any purpose," this is nothing more than a standard deviation clause which is found in virtually all charterparties and bills of lading and cannot be characterized as anything out of the ordinary.

In an attempt to criticize the trial court's opinion, appellant's brief on page 9 states that the Seven Seas/Nimpex Agreement "had no language relating to a 'single dollar a gross ton' profit." But the court was apparently relying on the testimorny given by the president of Seven Seas who, in discussing the Seven Seas/Nimpex agreement stated as follows:

THE COURT:

> What was the reason for signing that?

THE WITNESS:

> So that we can collect the dollar a ton from them, sir (468a).

In the second paragraph on page 10 of its brief, appellant acknowledges that there are two independent bases for the trial court's finding of liability on the part of Seven Seas: (1) Seven Seas was the carrier of the cargo within the meaning of the Carriage of Goods by Sea Act and did not establish that it was entitled to the benefit of any of the exceptions contained in that act (46 USC § 1304) and (2) Seven Seas Shipping was responsible for the loading and stowage of the cargo during which, the court found, the damage occurred.

## POINT I

### SEVEN SEAS WAS THE CARRIER OF THE CARGO AND IS FULLY LIABLE FOR ALL DAMAGES PROVABLE BY PLAINTIFF

It would appear that appellant Seven Seas is not appealing on the grounds of any mistake of law on the part of the court, but rather is attempting to retry its case *ab initio* before this court by seeking to have this court find that Judge Weinfeld's findings as to virtually every key fact were clearly erroneous.

Judge Weinfeld of course had the benefit of hearing the testimony first hand and of probing the witnesses in those areas where there were key factual issues and of observing the demeanor of the witnesses; in fact, early in this dispute Judge Weinfeld was aware of the clear cut factual issues which appellant now asks this court to pass upon. He commented, with regard to a request by Seven Seas' counsel for permission to take the testimony of the president of Seven Seas by deposition, that:

> I would rather hear live testimony of witnesses. I understand the desires to have the testimony taken by deposition but evidently you gentlemen are engaged in a rather serious fact question. I prefer to hear the live witness if I can. (trial transcript pp. 267-268).

This preference proved prudent in view of the most unusual and caustic characterization of Davey Jones' testimoney which Judge Weinfeld described as "glib and evasive . . . designed to exonerate Seven Seas of its obligations . . . at times . . . in utter disregard of compelling documentary proof . . . at other times . . . in flat contradiction of his own prior statements and admissions" (525a, 526a).

Undeterred by this blunt criticism expressed by a most distinguished and experienced District Court Judge, appellant, at this late stage, adjusts its contentions to now claim that it was an agent for Nimpex. But the president of Seven Seas testified (incredibility in view of the various agreements/charterparties) that Seven Seas acted only as "consultants" to Nimpex (414a), a position so at war with the facts as to have prompted the characterization in the first place.

This raises the issue of Seven Seas' contention that the trial court did not have the power to make findings of fact contrary to the testimony of a witness (Seven Seas' brief, p. 11, footnote), but apparently in making this statement Seven Seas ignored the court's reference to Dyer v. McDougal, 201 F. 2d 265 (2 Cir. 1952) both during the course of the trial (468a) and in its opinion (525a); this court's holding in *Dyer* is certainly applicable to the case at bar, and thus is quoted at length here (pp. 268-269):

> It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor' —is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and, indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This

> we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. [citations omitted]. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

This rule might well be applied to the "agency" argument as well but this is unnecessary since in its answer to the complaint Seven Seas admitted it was a carrier of merchandise by water and was the charterer of the POLARLAND for the subject voyage (14a). Moreover, in the preamble of the Ferrostahl/Seven Seas charterparty it is clearly stated that the agreement was between Ferrostahl and "Messrs. Seven Seas Shipping Corp. of New York" without any reservation that Seven Seas was acting as an "agent" (592a); furthermore, the president of Seven Seas admitted that he executed the charterparty "on behalf of Seven Seas" without reservation (232a). The invoice for freight from Ferrostahl was directed to Seven Seas Shipping Corp. individually, not as an agent for a principal (781a), and the Seven Seas invoice to Nimpex does not indicate that it was charging for agency fees but to the contrary indicates Seven Seas was collecting ocean freight and seaway tolls from Nimpex in connection with the carriage "of steel coils from Cleveland to Antwerp" (782a). There is not one word of sworn testimony in the record that Seven Seas Shipping Corp. acted as agents for Nimpex. All this is against the argument

that Seven Seas was anything but the carrier of the subject cargo.

Despite the fact that Seven Seas contracted with the Cleveland stevedore Great Lakes to have Great Lakes load and stow the cargo (765a, 766a, 328a), Seven Seas maintains it is not responsible for the negligent manner in which Great Lakes handled and stowed the cargo, contending that the risk of improper handling and stowing remained on Ferrostahl which had nothing whatsoever to do with the loading of the cargo nor selection of the stevedore. Seven Seas' contention of course ignores the fact that Seven Seas ("Carrier") in its agreement with Nimpex ("Shippers") undertook to load and stow the cargo, i.e., Seven Seas, at the direction of its president, specifically struck out language that obligated "Shippers" (Nimpex) to load and stow the cargo ("stowed, lashed and chocked by shippers stevedores at shippers' risk, responsibility and expense"),* a clear indication that Seven Seas, in the view of the shipper of the cargo, assumed the obligation of loading and stowing the cargo (469a, 597a, 598a). Furthermore, Seven Seas ignores its non-delegable obligation as a carrier to properly load and stow the cargo. 346 USC 1303(2).

The pertinent question is not whether Seven Seas in relationship to the owner of the vessel or the bareboat charterer Molena or the time charterer Ferrostahl assumed the risk of loading and stowing, but rather whether Seven Seas as a carrier assumed the obligation to properly load, stow and handle the cargo vis-a-vis the holder of the bill of lading (in its Answer Seven Seas admitted it was "a carrier of merchandise" 14a).

Since subsection (a) of section 1301 of the United States Carriage of Goods by Sea Act (46 USC 1300 *et*

*See p. 6 supra.

*seq.*) provides that the word "carrier" as used in the Act "includes the owner or the charterer who enters into a contract of carriage with a shipper" and since Seven Seas admitted it chartered the POLARLAND (14a, 592a), the sole question is "did Seven Seas enter into a contract of carriage with the shipper."

The term "contract of carriage" is said to apply "only to contracts of carriage covered by a bill of lading" (46 USC 1301).

The Seven Seas' argument that it did not bind itself under the terms of the bills of lading emphasizes the claimed lack of capacity to issue the bills of lading. This is based on the absence of a provision in the Ferrostahl/Seven Seas charterparty giving Seven Seas the authority to issue bills of lading on behalf of the vessel or Master. Seven Seas contends that the written authorization it produced at trial in which the master of the POLARLAND authorized World Shipping to sign bills of lading (778a) is conclusive evidence that World Shipping issued the bills of lading on behalf of Ferrostahl (Appellant's brief p. 16), but in fact this document is proof to the contrary. Since clause 35 of the Molena/Ferrostahl charterparty (762a) specifically authorized Ferrostahl "and/or [its] nominees or agents . . . to sign on master's and/or owner's behalf, bills of lading," if World Shipping was the agent of Ferrostahl as Seven Seas claims, there was no reason for the Master to give World Shipping the written authorization (77a) to sign the bills of lading unless, of course, World Shipping was acting as the agent not of Ferrostahl but of Seven Seas. In fact (1) under the Ferrostahl/Seven Seas charterparty Seven Seas was obligated to "appoint his own broker or agent at the port of loading" (592a), (2) under the Seven Seas/Nimpex Agreement the POLARLAND was "to be consigned to Carriers' [Seven Seas'] agents" at the port of loading (601a), (3) Ferrostahl represented to the

court that World Shipping was not its agent (73a), and (4) World Shipping was Seven Seas general agent in Cleveland (496a). It is clear that World Shipping acted as Seven Seas' agent, and that World Shipping as agent of Seven Seas was authorized by the Master to sign bills of lading which in fact were signed and dated in New York under the typed in name of World Shipping by J. Reynolds, the assistant to the president of Seven Seas (442a, 459a, 724a-728a).

The arguments that Seven Seas lacked capacity to issue bills of lading, that World Shipping acted only as agent of Ferrostahl and that J. Reynolds signed the bills of lading on behalf of World Shipping as Ferrostahl's agent were, of course, considered by Judge Weinfeld. They were rejected.

The conclusion is inescapable that the contract of carriage, i.e., the bills of lading signed by the assistant to the president of Seven Seas, bound Seven Seas as carrier of the cargo, consistent with its characterization of itself as a carrier both in its answer to the complaint (14a) and in the agreement it made with Nimpex under which it agreed to carry the cargo from Cleveland to Antwerp (597a).

In *Joseph L. Wilmotte & Co., Inc.* v. *Cobelfret Lines, S.P.R.L.*, 289 F. Supp. 601 (M.D. FL. 1968), the court was faced with the question of whether the defendant Cobelfret was a carrier as defined in COGSA. Cobelfret was the charterer of the vessel but apparently contended that it acted only as an agent for owner; the master signed the bills of lading which were then given to Cobelfret who in turn gave them to the shippers' forwarding agent. The court concluded that "since Cobelfret held itself out to the public as a common carrier, solicted and received merchandise for transportation, chartered the vessel to carry what it received, handled the signing of the bills of lading, determined the vessel on which the cargo should go and had the privilege under the charterparty to employ

stevedores and fix the freight, Cobelfret became a party to the contract of carriage when the bills of lading were signed." *Wilmotte, supra,* p. 603.

In the case at bar Seven Seas has admitted that it held itself out as a carrier of merchandise by water (14a, 230a), that it solicited customers and received merchandise for transportation by water (14a, 238a, 239a), that it chartered the POLARLAND to carry the subject cargo (14a, 233a), that it selected the vessel it would use to carry the cargo (238a, 595a, clause 17), that the bills of lading were executed by the assistant to the president of Seven Seas in New York in the offices of Seven Seas (442a, 459a), and that Seven Seas "had the privilege" under the charter-party with Ferrostahl to employ stevedores of its own choosing (595a, clause 16 subpart 9) and could fix the freight rate (597a). It is apparent that in accordance with *Wilmotte, supra,* Seven Seas was the carrier as that term is used in the Carriage of Goods by Sea Act and was a party to the contract of carriage, i.e., the three bills of lading covering the carriage of the 299 coils. See also *Pendleton* v. *Benner Line,* 246 US 353, 355 (1918).

As a carrier, under COGSA Seven Seas was required to "properly and carefully load, handle, stow . . ." (46 USC 1303) the cargo; since, as the president of Seven Seas himself admitted, all of the damage complained of by plaintiff, whether it be ovalization or mechanical damage, occurred during handling (490a), Seven Seas as carrier and as the party for whom the stevedoring services were performed in Cleveland is liable for all of plaintiff's provable/recoverable damages.

Under this court's holding in *Nichimen Co.* v. *M/V FARLAND,* 462 F. 2d 319, 330-334 (2 Cir. 1972), the POLARLAND, "having been cast in *rem* liability by reason of the acts and conduct of Seven Seas, is entitled

to recover from [Seven Seas] the amount of the maritime lien against it . . ." (527a).

## POINT II

### THE POLARLAND WAS ENTITLED TO RECOVER REASONABLE COUNSEL FEES EXPENDED IN CONNECTION WITH THE DEFENSE OF PLAINTIFF'S ACTION.

Initially, it must be pointed out that the statement made by Seven Seas on p. 29 of its brief that "the POLARLAND was awarded $10,000 for legal fees" is wrong. The POLARLAND was awarded only "reasonable counsel fees" (527a); the court did not make a determination as to the amount but rather counsel to Seven Seas agreed that $10,000 would be reasonable.

As the appellant's brief points out, the award of counsel fees is at the discretion of the trial judge. Seven Seas fails to make any showing that there was an abuse of this discretion by Judge Weinfeld. The vessel *in rem* was caused to incur substantial expense not only by virtue of the fact that Seven Seas breached its obligations as a carrier of the cargo in failing to properly load, stow and handle the shipment of steel, but also by virtue of the fact that the stevedores engaged by Seven Seas to handle the loading and stowing of the cargo did so improperly if not negligently.

In *A/S BROVANOR* v. *Central Gulf Steamship Corp.*, 323 F. Supp. 1029 (S. D. N. Y. 1970), the court noted that "since A/S BROVANOR was cast in liability by Central Gulf's failure to perform or cause to be performed its obligation to discharge the flour with due care and in a workmanlike manner, the A/S BROVANOR is entitled to be indemnified . . . for reasonable legal fees" (p. 1033); the decision contains numerous citations in support of its decision on that issue.

Seven Seas' brief indicates that "there are no equitable considerations present" in this matter which would permit an award of counsel fees, however it is submitted that the equitable consideration is that from the outset, the various agreements available to the parties, and particularly to Seven Seas, clearly indicated that Seven Seas was the carrier of the cargo and that if plaintiff was able to prove any of its damages, Seven Seas as the carrier would be liable and that the vessel *in rem* would have recovery over against it, yet Seven Seas forced the POLARLAND to expend substantial sums of money to defend itself, which involved trips to both Cleveland and to Antwerp, Belgium to attend depositions.

Apparently in the view of the trial judge, Seven Seas' insistence on ignoring the terms of agreements which it had agreed to comply with unjustifiably compelled the POLARLAND *in rem* to defend against plaintiff's claim.

## CONCLUSION

THE JUDGMENT ENTERED HEREIN SHOULD BE AFFIRMED WITH COSTS TO APPELLEES.

Respectfully submitted,

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RICHARD A. CORWIN

Service of three (3) copies of the within is hereby admitted this day of 19 .

Attorney for.

Service of three (3) copies of the within is hereby admitted this day of 19 .

Attorney for.